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THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA ^{2:00} <sub>PA
ERK</sub>

DAVID HATCHIGIAN
and JOAN RANDAZZO
Plaintiffs

CIVIL ACTION No. 20-4110

Vs.

CARRIER CORPORATION ✓
PEIRCE -PHELPS, INC.
Defendants

JURY TRIAL DEMAND

ORDER

AND NOW this _____ day of _____ 2020, upon
consideration of Pro Se responds to two Motions to Dismiss and is
Ordered and Decreed that Both Motions are **Denied**.

BY THE COURT

J

11220416

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DAVID HATCHIGIAN AND JOAN
RANDAZZO

JPA
ERK

V.

Civil Action: 20-4110

CARRIER CORPORATION AND
PEIRCE-PHELPS

JURY TRIAL DEMAND

**MEMORANDUM OF LAW OF PLAINTIFFS DAVID HATCHIGIAN AND
JOAN RANDAZZO IN OPPOSITION TO DEFENDANT CARRIER
CORPORATION'S MOTION TO DISMISS**

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I. Statement of Facts

The above-captioned matter was originally filed in in the Philadelphia County Court of Common Pleas. Plaintiff David Hatchigian filed a Writ of Summons on July 1, 2015 and then a Complaint against Carrier Corporation and Pierce-Phelps on September 20, 2015. (Motion Ex. B) Plaintiffs have now filed the present Complaint against the same parties under the same theories as previously pled in Philadelphia County. The settlement release was not executed and there was no dismissal or any final order terminating any aspect of the state court action prior to the commencement of the present action.

II. Legal argument**A. Based on a facial reading of the Complaint, this Court should deny Defendant's Motion to Dismiss Based on Lack of Subject Matter Jurisdiction Pursuant to Fed. R.C.P. 12(b)(1).**

A corporation is a citizen of its state of incorporation and its principal place of business, 28 U.S.C. § 1332; see dicta, *Kelly v. Metro. Grp. Prop. & Cas. Ins. Co.* (6th Cir. 2020) Defendant Carrier's motion to dismiss improperly disregards

that two states of citizenship are possible for Defendant Peirce Phelps. Peirce-Phelps, a Delaware corporation, has locations both in the state of Pennsylvania and at 360 Water St, Wilmington, DE 19804. Contrary to the contention in Carrier's motion, Plaintiffs are not alleging and have not alleged that "Defendant Carrier Corporation's citizenship of New York alone establishes diversity." (Motion to Dismiss, page 5) Rather, the complaint correctly alleges the company's state of incorporation as Delaware; this information is evident from the face of Plaintiffs' pleading, and directly contrary to Carrier's contention that each party's citizenship must appear on the face of the Complaint.

In addition, further contrary to Defendant's motion to dismiss, the mere fact that Defendant Peirce-Phelps is headquartered in Pennsylvania will not preclude complete diversity. See *Ricketti v. Barry*, 775 F.3d 611 (3rd Cir. 2015) (where the Third Circuit held there was complete diversity of citizenship among the parties, Ricketti being a citizen of New Jersey, Barry of Pennsylvania, and RestorixHealth of Nevada (its state of incorporation) and New York (the location of its principal place of business).") Doc 1, Para. 26 therefore adequately alleges that: 26.

Defendant PEIRCE-PHELPS (hereinafter, "Peirce-Phelps) is a Delaware corporation engaged in the sale and distribution of air conditioning and heating systems. Moreover, complete diversity exists based on a facial reading of the

complaint; therefore, the motion to dismiss based on lack of subject matter jurisdiction should be denied, and this case allowed to proceed on the merits.

B. The Motion to Dismiss Based on the Statute of Limitations Defense is Likewise Due to Be Denied.

a. The federal action was filed as a “continuation” of the state action.

The motion appears to rely on the rule “that the commencement of an action in a Pennsylvania court does not toll the statute of limitations applicable to a subsequent action commenced in federal court.” (¹This case is distinguishable from the Falsetti line of cases ²

However, there is state and federal precedent for tolling under the circumstances: For example, in *Holmes v. Strawbridge & Clothier*, No. 94-1999, 1994 U.S. Dist. LEXIS 16394 (E.D. Pa. Nov. 16, 1994), the plaintiff had filed various state law claims in Pennsylvania state court. While those claims were still pending, the plaintiff brought a separate action in federal court that asserted the same claims that were pending in state court, along with a related federal claim. *Id.* The court ruled that the state law claims in the federal action were not barred by

¹ See *Walstrom v. City of Altoona*, No.3:2006-81, 2008WL5411091, at *10 (W.D. Pa. Dec. 29, 2008) (citing *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 942 (Pa. Super. Ct. 2002))

² In *Falsetti v. United Mine Workers of America*, 355 F.2d 658, 662 (3d Cir. 1966), the court rejected appellant’s contention that his prior, unsuccessful, state court action served to toll the limitations period for his subsequently filed federal action. See also *Royal Globe Ins. Co. v. Hauck Mfg. Co.*, 335 A.2d 460, 462 (Pa. Super. Ct. 1975) (“An action in state court does not toll the running of the statute of limitations against subsequent action in federal court.” (citing *Falsetti*, 355 F.2d at 662))

the statute of limitations, and that plaintiff was entitled to tolling because the earlier state action was filed within the limitations period.

The *Holmes* court distinguished the *Falsetti* line of cases on two grounds. First, the court noted that “[those] cases are inapplicable to the instant matter because this plaintiff’s action has not been dismissed by the state court.” *Id.* at *3. Second, the court observed that in *Falsetti*, the state law claims had been “fully adjudicated by the state court prior to the plaintiff’s re-filing of identical state law claims in federal court. Therefore, had the district court in *Falsetti* exercised pendent jurisdiction over the state law claims in that case, it would have provided a forum for the state law claims where none existed.” *Id.* (*citation omitted*). The *Holmes* court reasoned that in the case before it, because the state action was still pending, the exercise of federal jurisdiction over the state claims would not create a forum where none existed.

In contrast, the procedural history of this case and the absence of discontinuance/termination of the state court litigation invokes the procedural facts in *Holmes*, and displaces the *Falsetti* rule given that Plaintiff Hatchigian did not obtain a discontinuance of the state court adjudication of the instant dispute before or after filing his challenge to settlement validity.

While it is correct to say that § 5535(a)(1) provides that if a party timely commences an action that is later terminated, that party may commence a new

lawsuit on the same cause of action within one year of the termination. (42 Pa. Cons. Stat. § 5535), this subsection of 5535 is not relevant to the state court action here, where the action was at no point dismissed.

Rather, as suggested in Carrier's motion, the court should take judicial notice of the record from a previous court proceeding between the parties. See *Oneida Motor Freight, Inc. v. United, Jersey Bank*, 848 F.2d 414, 416, n. 3 (3d Cir. 1988) The proceedings in the state court action provide a record basis for inferring the sufficiency of notice of the substance of Plaintiff's claims, and that permitting the federal suit to proceed would not result in any harm or prejudice to defendant, nor does it entitle defendant to a defense under the statute of limitations.

As in in *Holmes*, in the absence of such dismissal/ termination of the state suit, the tolling rule codified at § 5535 (pursuant to which the filing of a prior state action will not toll the limitations period for a subsequently filed state action where the first action was terminated by a discontinuance) provides no basis for adhering to the prohibition in *Falsetti*.

In addition, there is no question that arise as to "conditional dismissal" as in *Brennan v. Kulick*, 407 F.3d 603 (3d Cir. 2005), i.e., because there was no dismissal to start with, and it is undisputed that if Defendant had successfully removed the state court case to federal court, the claims would not be barred by the

statute of limitations. See, e.g., *Heater v. Kidspeace*, No. 05-4545, 2005 WL 2456008, at *2 (E.D. Pa. Oct. 5, 2005).

b. Defendants have waived the statute of limitations defense.

When negotiating settlement of, and requiring Plaintiff Hatchigian to execute the proposed settlement release regarding, the 2015 case (referenced in the Motion to Dismiss as the "First Action", alleging the same conduct against Carrier and Pierce-Phelps and related to the same HVAC equipment), Defendant Carrier impliedly promised payment if Hatchigian delayed filing his federal court lawsuit. See tolling agreement in *Kaiser Martin Grp., Inc. v. Haas Door Co.* (E.D. Pa. 2019).

C. The Motion to Dismiss based on Res Judicata is due to be denied as none of Plaintiffs' claims have been adjudicated on the merits.

In addition to the fact that the state court action was at no point dismissed or discontinued, none of Plaintiffs' causes of action have been adjudicated on the merits.

WHEREFORE, Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied in its entirety.

Dated this __ day of November, 2020

Respectfully submitted,

David Hatchigian

DAVID HATCHIGIAN, PLAINTIFF PRO SE

Joan Randazzo

JOAN RANDAZZO, PLAINTIFF PRO SE

November 2, 2020

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

**DAVID HATCHIGIAN
And JOAN RANDAZZO
*Plaintiffs***

Civil Action 20-cv-4110

Vs.

**CARRIER CORPORATION
And PEIRCE-PHELPS, INC
*Defendants***

JURY TRIAL DEMAND

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, a copy of Plaintiffs response to

Defendants Motion to Dismiss was mailed on above date and e-file with the Court

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DAVID

2:08

**THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA**

**DAVID HATCHIGIAN
and JOAN RANDAZZO**
Plaintiffs

CIVIL ACTION No. 20-4110

Vs.

**CARRIER CORPORATION
PEIRCE -PHELPS, INC. ✓**
Defendants

JURY TRIAL DEMAND

ORDER

AND NOW this _____ day of _____ 2020, upon
consideration of Pro Se responds to two Motions to Dismiss and is
Ordered and Decreed that Both Motions are **Denied**.

BY THE COURT

J

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

2:08

**DAVID HATCHIGIAN AND JOAN
RANDAZZO**

DA
PEK

V.

Civil Action: 20-4110

**CARRIER CORPORATION AND
PEIRCE-PHELPS**

JURY TRIAL DEMAND

**MEMORANDUM OF LAW OF PLAINTIFFS DAVID HATCHIGIAN AND
JOAN RANDAZZO IN OPPOSITION TO DEFENDANT PEIRCE PHELP'S
MOTION TO DISMISS**

I. Statement of Facts

The above-captioned matter was originally filed in in the Philadelphia County Court of Common Pleas. Plaintiff David Hatchigian filed a Writ of Summons on July 1, 2015 and then a Complaint against Carrier Corporation and Pierce-Phelps on September 20, 2015. (Motion Ex. B) Plaintiffs have now filed the present Complaint against the same parties under the same theories as previously pled in Philadelphia County. The settlement release was not executed and there was no dismissal or any final order terminating any aspect of the state court action prior to the commencement of the present action.

II. Legal argument

①

A. Based on a facial reading of the Complaint, this Court should deny Defendant's Motion to Dismiss Based on Lack of Subject Matter Jurisdiction Pursuant to Fed.R.C.P. 12(b)(1).

A corporation is a citizen of its state of incorporation and its principal place of business, 28 U.S.C. § 1332; see dicta, *Kelly v. Metro. Grp. Prop. & Cas. Ins. Co.* (6th Cir. 2020) ¹ Defendant Peirce Phelps' motion to dismiss improperly disregards that two states of citizenship are possible for Defendant Peirce Phelps. Peirce-Phelps, a Delaware corporation, has locations both in the state of Pennsylvania and at 360 Water St, Wilmington, DE 19804.

Moreover, complete diversity exists based on a facial reading of Plaintiffs' complaint, which correctly cites Delaware as the company's state of incorporation; the mere fact that Defendant Peirce-Phelps is headquartered in Pennsylvania will not preclude complete diversity. See *Ricketti v. Barry*, 775 F.3d 611 (3rd Cir. 2015) (where the Third Circuit held there was complete diversity of citizenship among the parties, Ricketti being a citizen of New Jersey, Barry of Pennsylvania, and RestorixHealth of Nevada (its state of incorporation) and New York (the

¹ The test for ascertaining corporate citizenship is set forth in the Supreme Court's decision in *Hertz Corp. v. Friend*, 559 U.S. 77, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010). *Hertz* applies when determining the citizenship of a corporation for diversity jurisdiction purposes, see 559 U.S. at 80–81, 130 S.Ct. 118 *Gentry v. Sikorsky Aircraft Corp.*, 383 F.Supp.3d 442 (E.D. Pa. 2019) Under *Hertz*, a corporation is a citizen of both (1) its state of incorporation, and (2) the state where the company keeps its "nerve center," i.e., the sole location where the corporation's high-level officers direct, control, and coordinate the corporation's activities. *Gentry, supra.*)

location of its principal place of business).”) Doc 1, Para. 26 thus alleges that: 26. Defendant PEIRCE-PHELPS (hereinafter, "Peirce-Phelps) is a Delaware corporation engaged in the sale and distribution of air conditioning and heating systems. As such, the motion to dismiss based on lack of subject matter jurisdiction is due to be denied.^{2,3}

Therefore, the motion to dismiss based on lack of subject matter jurisdiction should be denied at this time, and this case allowed to proceed on the merits.

B. The Motion to Dismiss Based on the Statute of Limitations Defense is Likewise Due to Be Denied.

a. The federal action was filed as a “continuation” of the state action.

Each of Defendant’s arguments based on discovery of the defect in 2013 is implicitly asserted in reliance on the rule “that the commencement of an action in a

² If plaintiffs had *arguendo* failed to specify the state of incorporation as Delaware in their pleading, limited jurisdictional discovery would have been appropriate to substantiate Peirce Phelps’ CFO’s contention of “complete autonomy” (Id., ¶7) *Gentry, supra* (jurisdictional discovery needed to decide citizenship “...a prerequisite for determining whether the Court has diversity subject matter jurisdiction”) Assuming the state of incorporation were unavailable for diversity purposes, CFO Subranni’s averment that Defendant “...maintains 21 branch sales offices, 13 in Pennsylvania, 5 in New Jersey and one in Delaware.” (Doc 8-3, ¶5) and that its HVAC business operations were acquired by a Florida entity last year (Doc 8-3, ¶6) would not support Pennsylvania as “the focal point of all of its business activities” (Id., ¶9)

³ *Hertz* recognized that anomalies might arise under the nerve center test; for instance if the bulk of a company's activities which are visible to the public take place in New Jersey but the top officers run the business from New York, the company's principal place of business, for diversity purposes, is in New York. Id.

Pennsylvania court does not toll the statute of limitations applicable to a subsequent action commenced in federal court.”

However, in *Falsetti v. United Mine Workers of America*, 355F.2d658,662(3dCir.1966), the court rejected appellant’s contention that his prior, unsuccessful, state court action served to toll the limitations period for his subsequently filed federal action. See also *Royal Globe Ins. Co.v. Hauck Mfg. Co.*, 335A.2d460, 462(Pa. Super.Ct . 1975)(“An action in state court does not toll the running of the statute of limitations against subsequent action in federal court.”(citing *Falsetti*, 355F.2dat 662)) The *Falsetti* line of cases is distinguishable from the instant action, and there are additionally relevant precedents for tolling under the circumstances pled here. For example, in *Holmes v. Strawbridge & Clothier*, No. 94-1999, 1994 U.S. Dist. LEXIS 16394 (E.D. Pa. Nov. 16,1994), the plaintiff had filed various state law claims in Pennsylvania state court. While those claims were still pending, the plaintiff brought a separate action in federal court that asserted the same claims that were pending in state court, along with a related federal claim. *Id.* The court ruled that the state law claims in the federal action were not barred by the statute of limitations, and that plaintiff was entitled to tolling because the earlier state action was filed within the limitations period.

Specifically, the *Holmes* court distinguished the *Falsetti* line of cases on two grounds. First, the court noted that “[those] cases are inapplicable to the instant

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matter because this plaintiff's action has not been dismissed by the state court." Id. at *3. Second, the court observed that in *Falsetti*, the state law claims had been "fully adjudicated by the state court prior to the plaintiff's re-filing of identical state law claims in federal court. Therefore, had the district court in *Falsetti* exercised pendent jurisdiction over the state law claims in that case, it would have provided a forum for the state law claims where none existed." Id. (citation omitted). The *Holmes* court reasoned that in the case before it, because the state action was still pending, the exercise of federal jurisdiction over the state claims would not create a forum where none existed.

In contrast, the procedural history of this case and the absence of discontinuance/termination of the state court litigation invoke the procedural facts in *Holmes*, and displaces the *Falsetti* rule given that Plaintiff Hatchigian did not obtain a discontinuance of the state court adjudication of the instant dispute before or after filing his challenge to settlement validity. While it is correct to say that § 5535(a)(1) provides that if a party timely commences an action that is later terminated, that party may commence a new lawsuit on the same cause of action within one year of the termination. (42 Pa. Cons. Stat. § 5535), this subsection of 5535 is not relevant to the state court action here, where the action was at no point dismissed. Instead, the court should take judicial notice of the record from a previous court proceeding between the parties. See *Oneida Motor Freight, Inc. v.*

United, Jersey Bank, 848 F.2d 414, 416, n. 3 (3d Cir. 1988) The proceedings in the state court action provide a record basis for inferring the sufficiency of notice of the substance of Plaintiff's claims, and that permitting the federal suit to proceed would not result in any harm or prejudice to defendant, nor does it entitle defendant to a defense under the statute of limitations. As in *Holmes*, in the absence of such dismissal/ termination of the state suit, the tolling rule codified at § 5535 (pursuant to which the filing of a prior state action will not toll the limitations period for a subsequently filed state action where the first action was terminated by a discontinuance) provides no basis for adhering to the prohibition in *Falsetti*. In addition, there is no question that arise as to "conditional dismissal" as in *Brennan v. Kulick*, 407 F.3d 603 (3d Cir. 2005), i.e., because there was no dismissal to start with, and it is undisputed that if Defendant had successfully removed the state court case to federal court, the claims would not be barred by the statute of limitations. See, e.g., *Heater v. Kidspeace*, No. 05-4545, 2005 WL 2456008, at *2 (E.D. Pa. Oct. 5, 2005).

Finally, in addition to the fact that the state court action was at no point dismissed or discontinued, none of Plaintiffs' causes of action have been adjudicated on the merits.

WHEREFORE, Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied in its entirety.

6

Dated this __ day of November ___, 2020

Respectfully submitted,

David Hatchigian

DAVID HATCHIGIAN, PLAINTIFF PRO SE

Joan Randazzo

JOAN RANDAZZO, PLAINTIFF PRO SE

November 2, 2020

②

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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*Plaintiffs***

Civil Action 20-cv-4110

Vs.

**CARRIER CORPORATION
And PEIRCE-PHELPS, INC
*Defendants***

JURY TRIAL DEMAND

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, a copy of Plaintiffs response to

Defendants Motion to Dismiss was mailed on above date and e-file with the Court

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11/26/2020

Mail - David Hatchigian - Outlook

DAVID HATCHIGIAN VS CARRIER #20-cv-4110

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Thu 11/26/2020 11:34 AM

To: Gail Olson <Gail_Olson@paed.uscourts.gov>

Hello Ms. Olson, i still am un able to log on to my case using login dh4476, p.w. Dhpa7257. can you help me? thank you. david hatchigian

11/26/2020

Mail - David Hatchigian - Outlook

DAVID HATCHIGIAN

David Hatchigian <david3091@outlook.com>

Thu 11/26/2020 11:42 AM

To: ecf_paed@paed.uscourts.gov <ecf_paed@paed.uscourts.gov>

I HAVE BEEN APPROVED FOR ECF AND WHEN I PUNCH IN MY LOGIN DH4476 AND P.W. dHPA7257 I AM UNABLE TO CONNECT. CAN YOU HELP ME? DAVID HATCHIGIAN

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1300

Mr David Hatchigian
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Handwritten text, likely a return address or recipient information, including a date 11/10/06.